STATE OF MICHIGAN
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. M. T. THOMPSON, JR.
Judge, 70th District Court
Saginaw, MI 48602
_____/

FORMAL COMPLAINT NO. 72
MASTER: Hon. Lawrence Glazer

EXAMINER'S WRITTEN CLOSING ARGUMENT

Paul J. Fischer (P 35454)
Examiner

Anna Marie Noeske (P 34091)
Associate Examiner

3034 W. Grand Blvd
Suite 8 - 450
Detroit, Michigan 48202
(313) 875-5110

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STATEMENT OF PROCEEDINGS

1. On August 7, 2003, the Michigan Judicial Tenure Commission issued Formal Complaint No. 72 against the Honorable M.T. Thompson, which included 25 paragraphs charging him with making personal solicitations to obtain funding for an educational program he was involved in producing and promoting, using the prestige of judicial office in making personal solicitations, misusing court resources, misrepresenting the support behind his projects in soliciting money, and failing to fully cooperate with the commission's investigation.

2. On August 7, 2003, the Commission requested that the Supreme Court appoint a Master pursuant to the provisions of MCR 9.210(A).

3. On August 21, 2003, Respondent filed his Answer in which he admitted paragraphs 1 – 9, 11 – 12, and 15 – 24 of the 25-paragraph Formal Complaint.

4. On August 22, 2003, the Supreme Court issued an Order appointing Hon. Lawrence Glazer as Master.

5. The first pre-hearing conference took place in the Michael Franck Building in Lansing, Michigan, on September 9, 2003.

6. A second pre-hearing telephone conference was held on October 9, 2003.

7. On October 13, 2003, the Examiner filed a Motion to Amend Formal Complaint No. 72 and a Brief in Support.

8. A third pre-hearing telephone conference was on October 13, 2003.

9. A fourth pre-hearing conference and hearing on the Examiner's Motion to Amend the Complaint took place in the Michael Franck Building in Lansing, Michigan, on October 21, 2003.

10. Formal Hearing on Formal Complaint No. 72 commenced on October 30, 2003, continued on October 31, 2003, November 3, 2003, November 4, 2003, November 19, 2003 and November 20, 2003.

11. On January 5, 2004, the completed transcript of the formal hearing was filed by the court reporter.

INTRODUCTION

This written closing argument is presented to the Master in his capacity as trier of fact. The Examiner has summarized the evidence, exhibits and pertinent legal and ethical provisions to assist the Master in arriving at his factual and legal conclusions. Wherever possible the facts are discussed in relation to applicable judicial and professional standards.

STATEMENT OF FACTS

Respondent is, and at all material times was, a judge of the 70th District Court in Saginaw, Michigan. As a judge, he was and remains subject to all the duties and responsibilities imposed on him by the Michigan Supreme Court, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205.

In 1997 – 1998, Respondent began developing a Middle School Crime Prevention Program, called "Making Choices and Facing Consequences, which he continued to work on for five years. In December 1998, Respondent completed his initial proposal which he sent to over fifty (50) educators, criminal justice system professionals, and others. He met with numerous individuals and groups to discuss his proposal. In 2000, Respondent completed his initial set of program materials, including three copyrighted workbooks and accompanying videos.

On March 12, 2001, Respondent met with John Ferry, Jr., State Court Administrator, Kevin Bowling, Region III Administrator, and Bruce Kilmer, Region III State Court Administrator, to seek their support of his "Making Choices and Facing Consequences" program. On April 20, 2001, Respondent met with John Ferry, Kevin Bowling and Dr. Donald Weatherspoon, then Assistant Superintendent, Michigan Department of Education, to further discuss his program. Neither Bruce Kilmer, John Ferry, Kevin Bowling or Dr. Weatherspoon

ever agreed to sponsor or co-sponsor, endorse or co-endorse Respondent's Making Choices or Bully-proof programs.

In approximately August – September 2001, Respondent completed an anti-bullying program called "Bullyproof" and decided to conduct an anti-bullying campaign to introduce his program to the educational community. Respondent presented his programs at the Michigan Association of School Boards Meeting in Frankenmuth on July 20, 2001 and in Mackinac on August 24, 2001. He received $1,000 for speaking at each event.

Respondent used official 70th District Court stationery to personally solicit donations to produce and implement his programs as well as for business correspondence pertaining to the production of his materials. Respondent solicited contributions to finance some of the events and activities involved in his Making Choices and Facing Consequences program, his anti-bullying campaign, and/or law day activities, including but not limited to an anti-bullying puppet show, from Citizen's Bank Trust Department, Dow Corning Corporation, Delphi Automotive Systems (G.M.), Braun Kendrick Finkbeiner P.L.C., and Horizons Conference Center. Respondent had brochures prepared advertising the Saginaw Bar Association Law Day and featuring his anti-bullying program without the knowledge or approval of the Saginaw County Bar Association Board.

On December 3, 2001, Respondent wrote a letter on 70th District Court stationery to Terry Pruitt, Manager, State Public Affairs, Dow Corning Corporation, requesting that Dow Corning contribute $5,000 toward his anti-bullying campaign. Dow Corning complied with Respondent's solicitation and donated $5,000.

On December 3, 2001, Respondent wrote a letter on 70th District Court stationery to Pete Shaheen, Horizons Conference Center, confirming Mr. Shaheen's verbal agreement to contribute

more than half the total cost of the Saginaw Bar Association's Annual May 2, 2002 Law Day Banquet.

In January 2002 Respondent personally solicited a contribution from Delphi Saginaw. Delphi Saginaw complied by donating $5,000 to Respondent.

On January 24, 2002, Respondent wrote Helen M. James, Assistant Vice President & Trust Officer, Citizens Bank Trust Administrative Committee, on 70th District Court stationery, to formally apply for a grant in the amount of $10,000 to finance two activities he wished to initiate, an anti-bullying campaign packet of materials and an anti-bullying puppet show. Citizens Bank complied with Respondent's solicitation and donated $10,000.

Respondent misrepresented in his letter to Ms. James, that the Michigan Department of Education, the Michigan Supreme Court acting through the State Court Administrative Office, and the Michigan Judicial Institute agreed to jointly sponsor "Making Choices and Facing Consequences" as a pilot program in ten to fifteen school districts throughout Michigan when none of the entities had agreed to do so.

Respondent telephoned John A. Decker, Esq., from Saginaw's largest law firm, Braun Kendrick Finkbeiner P.L.C., to personally solicit a contribution to present an anti-bullying puppet show developed by Respondent and a group from his church, the Zion Puppet Warriors. On January 7, 2002, Respondent wrote a letter to John A. Decker on official 70th District Court stationery, following up on the telephone conversation and asking that his law firm donate $3,000 to underwrite the cost of the anti-bullying puppet production. The Braun Kendrick Finkbeiner law firm complied with Respondent's solicitation by donating $1,000.

Respondent misrepresented in his letter to John Decker that it was the "Saginaw County Bar Association's 'formal request' that Braun Kendrick Finkbeiner P.L.C. assist with our 2002

Law Day effort by underwriting the cost of our elementary school anti-bullying puppet production" when the Saginaw County Bar Association had neither authorized nor had knowledge of Respondent's solicitation made purportedly on its behalf. In the same letter, Respondent also misrepresented that the Michigan Department of Education, the Michigan Supreme Court acting through the State Court Administrative Office, and the Michigan Judicial Institute agreed to jointly sponsor "Making Choices and Facing Consequences" as a pilot program in ten to fifteen school districts throughout Michigan when none of the entities in question had agreed to sponsor the program.

On February 12, 2002, Respondent wrote a letter to Pat Sutton on 70th District Court stationery, after telephoning Dr Larry Hazen, to request that Anderson Eye Association sponsor or co-sponsor a benefit concert at Saginaw Valley State University by the United States Air Force Orchestra's Strolling Strings which would cost approximately $10,000. Anderson Eye Associates complied with Respondent's solicitation request by donating $2,5000.

On February 12, 2002, Respondent wrote a letter to Terry Niederstadt, executive Vice President and Regional Retail Executive of Citizens Bank, on 70th District Court stationery, to request that Citizens Bank sponsor or co-sponsor a benefit concert at Saginaw Valley State University by the United States Air Force Orchestra's Strolling Strings which would cost approximately $10,000. Citizens Bank complied by donating $6,000.

On February 12, 2002, Respondent wrote another letter to Terry Pruitt at Dow Corning, in which he personally solicited Dow Corning to sponsor or co-sponsor his presentation of the Red, White and Blue Saginaw Valley State University by the United States Air Force Orchestra's Strolling Strings which would cost approximately $10,000. Mr. Pruitt complied by personally donating $4,000 by credit card.

Respondent's name and judicial status were prominently featured at the top of advertisements for the benefit concert: "Honorable M.T. Thompson, Jr., 70th District Court presents: The United States AIR FORCE STRINGS . . . Join Judge Thompson and the Strolling Strings as we celebrate America!" Respondent was also listed, with his court address and telephone number, as the contact person for further information about the program.

Respondent also wrote letters on 70th District Court stationery concerning work for his projects and donations to fund them to other individuals and companies, including, but not limited to, Lucy Allen, President and CEO of the Saginaw Community Foundation, Mary Princing of Princing & Ewend, and Paul Pecora and Lori Maxson of Bresnan Communications.

On February 3, 2003, the Commission staff sent Respondent a letter that included a request for copies of his "Making Choices and Facing Consequences" and "Bullyproof" program/materials. On February 6, 2003, Respondent telephoned the Commission Executive Director and objected to the request. On February 20, 2003, Respondent sent a letter directed to the Executive Director in response to the staff's February 3, 2003 letter. He provided some additional information but refused to provide the materials, asserting they were irrelevant to the allegations of misconduct. On March 20, 2003, Respondent was sent a subpoena requesting he provide the previously requested materials by March 31, 2003. He failed to comply until July 30, 2003, after he retained counsel.

ARGUMENT

I

STANDARD OF REVIEW

A. Standard Of Proof

The standard of proof in disciplinary cases is preponderance of the evidence. *In re Ferrara*, 458 Mich 350, 360 (1998); *In re Jenkins*, 437 Mich 15, 18 (1991); *In re Loyd*, 424 Mich 514, 521-522 (1986). The purpose of judicial discipline is not to punish, but to maintain the integrity of the judicial process. *In re Seitz*, 441 Mich 590, 624 (1993); *In re Jenkins*, 437 Mich 15, 28 (1991), *In re Mikesell*, 936 Mich 517, 527-529 (1976). These proceedings are civil and *not* quasi-criminal in nature precisely because their purpose is the maintenance of standards of judicial fitness. *Mikesell*, *id*., *In re Probert*, 411 Mich 210, 225 (1981); *In re Diener and Broccolino*, 268 MD 659, 670; 304 A2d 587, 594 (1973), cert den 415 US 989; 94 S Ct 186; 39 L.Ed2d 885(1974); *In re Rome*, 218 Kan.198; 542 P2d 676, 683 (1975).

B. The Master's Role In Determining Conduct Clearly Prejudicial To The Administration Of Justice

The Master must: (1) determine the actual facts established by the evidence; (2) compare those facts to relevant ethical standards; and (3) conclude whether grounds for discipline, as outlined by constitution and court rule, have been established. The Master does not make recommendations as to discipline. That responsibility rests solely with the Commission, pursuant to MCR 9.220.

The ultimate question for the Master to resolve is:

> [w]whether the conduct complained of constitutes misconduct in office or conduct that is clearly prejudicial to the administration of justice. All the circumstances are to be considered * * *. *Matter of Del Rio*, 400 Mich 665, 694 (1977).

There are two sources that establish the standards of judicial conduct. The first, MCR 9.205, "sets forth the grounds for a finding of judicial 'misconduct.'" The second, the Code of Judicial Conduct, in relevant part provides that a "judge should uphold the integrity and independence of the judiciary" (Canon 1) and that a "judge should avoid impropriety and the appearance of impropriety in all activities." (Canon 2) *In re Ferrara*, 458 Mich 350, 359 - 360 (1998).

Conduct which is clearly prejudicial to the administration of justice may present itself in many forms. It is not difficult to recognize such conduct even though it may be impossible to give an all-inclusive definition. As the Supreme Court of Maryland stated:

> Precisely what 'conduct prejudicial to the administration of justice' is or may be in any or all circumstances, we shall not undertake to say. Indeed, a comprehensive, universally applicable definition may never evolve but it is unlikely we shall ever have much trouble recognizing and identifying such conduct whenever the constituent facts are presented. *Diener*, *supra*, at 594.

Guidelines for professional and judicial conduct are found in the Rules of Professional Conduct and the Code of Judicial Conduct. Also to be considered are the general moral and ethical standards expected of judicial officers by the community. *Bartlett v Flynn*, 50 AD2d 401, 378 NYS2d 145, 148 (1976). The phrase "conduct prejudicial to the administration of justice" incorporates many standards and:

> [c]onsideration should be given to the traditions, heritage, and generally recognized practices of the courts and legal profession, the common and statutory law, codes of judicial conduct, and additional notions of judicial ethics. While not necessarily determinative, these may be usefully consulted to give meaning to the constitution and statutory prohibitions . . . *Matter of Edens*, 290 NC 299; 226 SE2d 5, 9 (1976).

There is an implicit burden always resting on a judge to be vigilant in detecting possible impropriety or the likelihood of the appearance of impropriety. *Application of Gaulkin*, 69 NJ 185; 351 A2d 740, 747 (1976).

C. Respondent's Conduct Must Be Measured By Objective Standards

In evaluating the Respondent's conduct, the Master must adopt an *objective* approach, rather than focus on subjective elements. Case authority amply supports this method of evaluation. In *Ferrara*, *supra* at 362, the Michigan Supreme Court, citing itself in *In re Tschirhart*, 422 Mich 1207, 1209 – 1210 (1985), recognized that:

> **[t]he proper administration of justice requires that the Commission view the Respondent's actions in an objective light.** The focus is necessarily on the impact his statements might reasonably have upon knowledgeable observers. Although the Respondent's subjective intent as t the meaning of his comments, his newly exhibited remorsefulness and belated contrition all properly receive consideration, any such **individual interests are here necessarily outweighed by the need to protect the public's perception of the integrity of the judiciary.** (Emphasis added)

Similarly, California's Supreme Court, in contrasting the correct approach bf the Commission versus the incorrect approach by the masters in evaluating the respondent judge's conduct, observed:

> Where the Commission's findings in regard to these specifications did differ from the masters', they reflected the **Commission's quite proper determination to focus on an objective appraisal** of petitioner's conduct in terms of the effect of such conduct on the administration of justice. The masters were more concerned with the subjective motivations of petitioner in engaging in specified conduct, and with the subjective appraisal of his motivations by the person directly affected by the specified conduct. *Geiler v*

> *Commission on Judicial Qualifications*, 10 Cal 3d 270; 110 Cal Rptr 201; 515 P2d 1, 5 (1973). (Emphasis added)

Similarly, in *Matter of Crutchfield*, 289 NC 597; 223 SE2d 822, 826 (1975), the North Carolina Supreme Court commented:

> Whether the conduct of a judge may be characterized as prejudicial to the administration of justice which brings the judicial office into disrepute **depends not so much upon the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers**. (Citations omitted, emphasis added)

Consistent with this approach, the Michigan Supreme Court has indicated "good faith" is not an affirmative defense to misconduct charges. At best it only goes to mitigation of sanction. *In re Seitz*, 441 Mich 590, 724 (1983), *In re Lawrence*, 417 Mich 248, 267, fn 14 (1983); *In re Laster*, 404 Mich 449, 461 (1979).

In *Seitz*, the respondent judge asked that his conduct be viewed in the context of the circumstances at the Monroe County Probate Court which allegedly led to undue stress. The Master and the Commission rejected Respondent's mitigation defense, which sought a subjective interpretation of his actions. The Court noted it had previously stated: "There is no doubt that 'good faith' should be considered as a mitigating factor to the acts of misconduct but not as an affirmative defense to charges of misconduct." *Seitz*, at 724; *Lawrence*, *supra*, at 267, *Laster*, *supra*, at 461. It follows the Master must generally reject any attempts by Respondent to interject his professed "motives," "purpose," "intent" or "good faith" in determining whether Respondent's actions, as charged in the formal complaint, constitute conduct clearly prejudicial to the administration of justice.

II

RESPONDENT INTENTIONALLY MADE NUMEROUS INDIVIDUAL SOLICITATIONS FOR MONEY IN VIOLATION OF THE CODE OF JUDICIAL CONDUCT

A. Respondent Knowingly Made Numerous Direct, Personal Solicitations To Fund And Advance Programs He Developed

Direct, personal solicitation of contributions by a judge is improper no matter how laudable the purpose or beneficiary. Even well-intentioned conduct that gives the appearance of using the powers of judicial office to solicit money *is* misconduct. *In re Merritt*, 431 Mich 1211 (1988). Michigan's Code of Judicial Conduct, Canon 5B(2), specifically provides:

> A judge **should not individually solicit funds for any educational, religious, charitable, fraternal or civic organization, or use or permit the use of the prestige of office for that purpose**, but may be listed as an officer, director, or trustee of such an organization. A judge may, however, join a general appeal on behalf of an educational, religious, charitable, or fraternal organization, or speak on behalf of such organization. (Emphasis added)

The authors of *Judicial Conduct and Ethics*, explain the reason for such a rule:

> The purpose of the prohibition is to **avoid the misuse of the judicial office.** The rule addresses the **dual fears that potential donors either may be intimidated** into making contributions when solicited by a judge, or **that they may expect future favors** in return for their largesse. The possibility of corruption in fund-raising is remote, although not unknown. In either case, the **dignity of the judiciary suffers,** and, since most charitable organizations can raise funds perfectly well without the involvement of judges, a broad prohibition was deemed appropriate." Jeffrey M. Shaman, Steven Lubet, James J. Alfini, *Judicial Conduct and Ethics*, 295 (3d ed. 2000). (Emphasis added)

Additionally, MCR 9.205(B)(1)(e) prohibits misuse of judicial office for personal advantage or gain, or for the advantage or gain of another.

It is undisputed that Respondent made numerous direct and personal solicitations of funds to finance his Making Choices and Facing Consequences project and received thousands of dollars in donations. He admitted making the solicitations alleged in Formal Complaint No. 72, all of which were made on 70th District Court stationery. (Answer, paragraphs 1 – 9, 11 – 12, and 15 – 20, and Volume 1, 34 – 52, Stipulations) Respondent also failed to disclose several other solicitations that the Master declined to permit the Examiner to pursue.[1]

On May 21, 1999, Respondent established his *Middle School Crime Prevention Initiative* fund, also known as *Making Choices and Facing Consequences Fund - Middle School Crime Prevention Initiative* with the Saginaw Community Foundation. (Exhibit 1) Respondent had complete control and sole access to the fund, which he used to finance various projects and programs, including, but not limited to, the scripting and editing of "Making Choices and Facing Consequences" workbooks and videos for which he holds a copyright, an anti-bullying program, a Zion Puppet Warriors show affiliated with Respondent's church, promotion of his programs in various brochures and self-promotion through advertisements for events such as the United states Air Force Strolling Strings. Respondent claimed he believed by establishing a fund within the Saginaw Community Foundation ("SCF") to receive the donations he solicited, that he had insulated himself from any wrongdoing. (Volume 1, 66 – 67, *Mr. Thomas*, and Volume 5, am, 793, *Thompson*) His position defies credulity in light of the clear prohibition against the conduct in which he engaged personally, directly and willfully.

All of Respondent's written solicitations were made on 70th District Court stationery. He spoke and then wrote to Pete Shaheen of Horizons Conference Center and requested that Horizons donate half the cost of the 2002 Saginaw Bar Association Law Day banquet, which it

[1] The Master denied the Examiner's request to make a separate record pursuant to MCR 9. 208 (C).

did. Respondent admitted he contacted and wrote letters on official 70th District Court stationery to individuals at Dow Corning, Delphi, Citizens Bank and Anderson Eye Associates, and the Braun Finkbeiner law firm, *inter alia*, requesting they donate thousands of dollars toward his Making Choices and Facing Consequences program, his anti-bullying program, a puppet show from his church group, and a United States military band concert. (See Respondent's Answer to Formal Complaint No. 72, paragraphs 1 – 9, 11 – 12, and 15 – 24.) Each of the corporations or individuals acceded to Respondent's requests and contributed thousands of dollars.

The admitted evidence at the hearing included several actual solicitation letters, follow-up letters, and thank-you letters:

1) Respondent's 12/3/01 letter to Pete Shaheen (Exhibit 17)

2) Respondent's 12/3/01 letter to Terry Pruitt, Dow Corning (Exhibit 18)

3) SCF 1/2/02 letter to Ann DeBoer, Dow Corning (Exhibit 19)

4) Respondent's 2/12/02 letter to Terry Pruitt, Dow Corning (Exhibit 20)

5) Respondent's 1/24/02 letter to Helen M. James, Citizens Bank (Exhibit 22)

6) 1/22/02 letter from Beth Bernthal, Delphi Saginaw, to Respondent (Exhibit 25)

7) Respondent's 1/7/02 letter to John A. Decker, Esq. (Exhibit 27)

8) Respondent's 2/12/02 letter to Terry Niederstadt, Citizens Bank (Exhibit 31)

9) Respondent's 2/15/02 follow-up letter to Terry Niederstadt, Citizens Bank (Exhibit 32)

10) Respondent's 2/12/02 letter to Pat Sutton, Andersen Eye Associates (Exhibit 35A)

11) Respondent's 2/15/02 letter to Pat Sutton, Andersen Eye Associates, 02/15/02 (Exhibit 35B)

12) Respondent's 2/15/02 letter to Beth Bernthal, Delphi Automotive (Exhibit 37)

B. Respondent's Alleged Ignorance And Subjective Intent Or Good Faith Do Not Constitute Defenses To Charges of Misconduct

Respondent cannot justify his actions by professing ignorance as a defense. Not only is ignorance of the law no excuse, but the Michigan Supreme Court has made it clear that it is not an acceptable defense in judicial disciplinary proceedings. A judge's self-professed ignorance of a rule which all judges in this state are obligated to understand exhibits a fundamental disregard for the Code of Judicial Conduct. *In re Jenkins*, 437 Mich 15, 23 (1991).

The prohibition on solicitations, no matter how worthy the cause, is absolute. Respondent blatantly violated the Canon. Respondent tried to have it both ways, by admitting he solicited the money, but claiming he did not know at the time that it was wrong. (Volume 3, 488-489, *Mr. Thomas*) Similarly, Respondent's attempt to profess a defense of "intent" must fail. Respondent claimed he had raised the "defense of intent" in one of their answers to the complaint (Volume 3, 489, *Mr. Thomas*) which is simply not true as a brief perusal of Respondent's Answer to Formal Complaint No. 72 will readily establish. The only "defense" Respondent raised was "mistake of fact" and that referred to the allegation concerning misrepresentations made by him. (See Answer, page 8.)

Although Respondent never raised an affirmative defense of "intent" in his Answer to the Complaint, during the hearing he suddenly attempted to assert an affirmative defense that his "intent" was not to violate the Code of Judicial Conduct. (Volume 3, 488 – 489, *Mr. Thomas*) When that position failed, Respondent argued his alleged lack of intent was due to others allegedly knowing what he was doing and that should go to mitigate any penalty.[2] (Volume 3,

[2] In allowing a certain question, the Master referred to "my decision on any penalty." As noted above, only the Commission makes recommendations concerning any action to be taken against a judge, pursuant to MCR 9.220. The Master's report is limited to a "brief statement of the proceedings and findings of fact and conclusions of law with respect to the issues presented by the complaint and answer," pursuant to MCR 9.214.

493, *Mr. Thomas*) Once the Master clarified the type of question that could be asked, Respondent abandoned that line of questioning. (Volume 3, 494, *Mr. Thomas*)

Significantly, Bruce Kilmer had already testified that he had specifically warned Respondent not to solicit money back in 1999. (Volume 2, 283 - 285, 295, 313 -315, 341, *Kilmer*) He had notes in his file to that effect. (Volume 2, 295, *Kilmer*) Further, when Respondent began to realize that others had become aware of his wrongdoing, he told Mr. Kilmer he wished he had listened to him. Mr. Kilmer testified:

> A. Two years later when all of this hit the fan, M.T. Thompson told me he wished he had listened to me in 1999, I was right, he should have listened to me. He shouldn't have solicited the funds. He shouldn't have gotten close to it. (Volume 2, 342, *Kilmer*)

Respondent was unhappy about the testimony elicited from Mr. Kilmer on cross-examination that Mr. Kilmer actually had kept a note in his file describing the warning he gave Respondent I 1999. (Volume 2, 295 – 296, *Kilmer*) Respondent implied Mr. Kilmer had been asked about solicitations when in fact Mr. Kilmer had been told that the solicitations had been admitted and the only issue he was pursuing was whether there had been an agreement to co-sponsor Respondent's program. (Volume 2, 293 – 298, 313 – 315, *Kilmer*) Mr. Kilmer explained:

> Q. Mr. Kilmer, doesn't that contradict what you told me last week when I asked you if there was a writing in your file that would confirm that advice?
>
> A. No**, because you asked me about endorsement**. I understood Judge Thompson was **admitting soliciting money**. I thought that was not a relevant issue. I thought the only issue the Judicial Tenure Commission hearing was did we endorse the program. That's, I mean, I was trying to save time, efficiency. **It would even make him look bad to put that in there.** I thought he had admitted it all, so why just heap it on some more." (Volume 2, 315, *Kilmer*, emphasis added)

Respondent had demanded to have the file produced in the apparent hope he could impeach Mr. Kilmer by discovering there was no such note. (Volume 2, 296, *Mr. Thomas*) The Master directed Mr. Kilmer to provide complete copies of his file to the Examiner and Respondent's counsel. (Volume 2, 297, *Master*) Mr. Kilmer did produce the complete files. (Volume 6, 1014 -1015) After receiving the complete file, Respondent did not pursue the matter, nor did he object further.

There is no circumstance, mitigating or otherwise, in which Respondent can claim to have been ignorant of a rule or unaccountable for violation of a rule he was required to know. Not only was he obligated to be familiar with and follow the Code of Judicial Conduct, he had been specifically warned against personal solicitations. Respondent willfully and intentionally violated the Code and ignored a direct warning to advance his own interests.

Cases involving direct solicitations have been addressed by the Supreme Court in this state as well as others. In most instances a judge's conduct has been limited to a single incident and, unlike Respondent's situation, involved an identifiable charitable entity as beneficiary. Examples include *In re Merritt,* 431 Mich 1211 (1988), *In re Cooley*, 454 Mich 1215 (1997), *In re Shannon*, 465 Mich 1304 (2002), and most recently, *In re Helen Brown*, 468 Mich 1228 (2003).

Respondent, however, solicited funds for a variety of purposes that vary from ostensible charitable and civic purposes to Respondent's personal benefit. He hired the United States Air Force Strolling Strings Orchestra to perform a concert and his church's puppet group to perform a show promoting his anti-bullying middle school program. The scope of impropriety in this case increased substantially by reason of the numerous contributions Respondent requested and obtained that benefited him personally and financially. Respondent undertook a purely personal,

private enterprise for which he solicited funds. The fact that some schools benefit or may benefit from his program does not mitigate his actions. Essentially he used his judicial office to solicit money to promote a business, similar to that of any individual who has a business and solicits money from others to benefit the individual's business and ultimately the individual. Respondent's middle school crime prevention program is not a charity. He owns the copyright and has complete control over who gets to use it, how it gets used, and at what cost, if any. A judge is entitled to own a copyright, and ownership of a copyright is not necessarily misconduct. Judge Martone, an Oakland County district judge who created a very well-received anti-drinking program targeting school-age children which he copyrighted, was frequently brought up during the hearing. (See Volume 1, 70, 108 – 110; Volume 3, 355, 356 – 358, 415; and Volume 5, am, 774) The critical difference, however, is that Judge Martone neither solicited nor used the prestige of his office to solicit contributions or other forms of donations to pay for or advance his program.

To date Respondent has apparently provided the materials free of charge to school districts in the Saginaw area to try out the program (and indirectly promote it). He admitted in a meeting with John Ferry, Bruce Kilmer and Kevin Bowling that one of the reasons he obtained the copyright was to have control if the program had marketable value (Exhibit dd, Separate Record) The Examiner emphasizes that a judge is not prohibited from writing a book or creating a program or obtaining a copyright and is entitled to just compensation for his work. A judge may not, however, solicit contributions to finance the judge's own entrepreneurial plans.

Respondent also persuaded the Saginaw Bar Association to change its agenda for its 2002 Law Day to use an anti-bully program he had developed, but had not copyrighted. Respondent then prepared brochures in which he was prominently featured as co-presenter of the Law Day.

He solicited funds in the name of the Saginaw Bar Association for his anti-bully puppet show without its knowledge or authorization.

Ken Kable, an attorney with Braun Kendrick Finkbeiner, PLC, the law firm solicited by Respondent, was a member of the Saginaw Bar Association Board of Directors. He testified that the Board was not aware of the puppet show nor did it authorize Respondent to solicit funds. (Volume 4, p. 644, *Kable*) Mr. Kable also confirmed that the Saginaw Bar Association, through its Board of Directors, did not authorize any "formal request" of the Braun, Kendrick Finkbeiner law firm. (Volume 4, p. 647, *Kable*) Mr. Kable further testified that the Saginaw County Bar Association, through its Board, never authorized the use of its name on a brochure Respondent had prepared to advertise his anti-bullying program and the Zion Puppet Warriors show. (Volume 4, p. 653, *Kable*) The brochure featured several photographs of Respondent and looked like election material. This was an election year for Respondent. The brochure was essentially a form of campaigning Respondent did not have to pay for. (Exhibit 54)[3]

Part of Respondent's defense is that the Saginaw Bar Association Board authorized him to solicit money on its behalf. That position is wholly untenable. Neither the Saginaw County Association Board nor the Saginaw County Law Day Committee had any more power to authorize Judge Thompson to violate the Code of Responsibility than they had to authorize him to break the law. Further, Judge Thompson was obligated to know that. Ignorance has never been a defense.

[3] Even using the Zion Puppet Warriors to produce the puppet shows is self-promoting. The Zion Puppet Warriors belonged to Respondent's Church, (Volume 6, 960, *Thompson*). Respondent got to engage in old fashioned pork barrel politics by bringing home the bacon to his constituency. In addition, he could reap the rewards of admiration, adoration and respect – the very currency needed to propel him to election victory should there be an opponent – by his being a vocal proponent of the puppeteers. For example, Respondent bought all the children lunch, only to reimburse himself later. *(Id*. at 963) But his perceived largesse in treating the children to lunch occurred immediately.

Even James Brisbois, Esq., Chairman of the Law Day Committee, who repeatedly expressed relief at having someone else come assume responsibility to come up with funding, testified the Bar Association had no such authority when questioned by the Examiner on Re-Direct:

> Q. You're not suggesting, though, that the Law Day Committee or the Bar Association had authority to confer greater authority on Judge Thompson than would be allowed under the Canons of the Code of Judicial Conduct?
>
> A. **No.** (Volume 2, p. 265, *Brisbois*)

More telling, however, is Respondent's own testimony. Respondent actually admitted he was aware a judge is not permitted to solicit money for his campaign or for his own personal use. (Volume 5, pm, 893 – 894, *Thompson*) Respondent admitted having read the Code of Judicial Conduct prior to September 5, 2001. (*Id*. at 951) He even claimed he did not feel that the Code or Canon 5 specifically applied to his situation. (*Id*.) This was Respondent's personal use. The money he solicited was not going to some charity fund, like the March of Dimes or the Make a Wish Foundation.[4] Instead, the money was going to pay, in part, for bills Respondent ran up for the materials and production of a program he owned and for which he held a copyright, and for events he independently arranged to promote himself and his program.[5] Respondent testified only he had the authority to direct Ms. Allen at the Saginaw Community Foundation to pay bills out of the fund. (Volume 5, pm, 908, *Thompson*)

[4] To be clear, even if the money had been going to a legitimate, standard charity Respondent's solicitations would still have been improper.

[5] Respondent had a large colorful advertising brochure prepared for the U.S. Air Force Strolling Strings Concert that prominently featured Respondent as the presenter of the concert. (Exhibit 55).

C. Personal Solicitations By Judges For Any Purpose Constitute Misconduct

Personal solicitations by judges, whether for campaign purposes or for charitable purposes, are inappropriate and have resulted in formal discipline by the Supreme Court in the past. Most recently, in *In re Helen Brown*, 468 Mich 1228 (2003), Judge Brown was involved in a nonprofit charitable organization. She was the founder and CEO of the Board of Trustees of the Coalition for Family Preservation. Judge Brown's name and judicial status were used on invitations describing her as sponsoring the event.

In *In re Shannon*, 465 Mich 1304 (2002), 36th District Court Magistrate Thomas Shannon permitted a police officer to sit at a table in the courtroom with a bag of tickets from the Detroit Fire and Police Field Day. Respondent dismissed numerous tickets and advised the defendants to purchase tickets. In some cases he told them to purchase more tickets or "dig deeper." The average ticket purchase was approximately $50 per person.

In *In re Cooley*, 454 Mich 1215 (1997), Judge Cooley, *inter alia*, participated in the solicitation of funds from Don Massey of Don Massey Cadillac, Inc. The money was solicited for the sponsorship of a radio program she produced and hosted.

In *In re Merritt*, 431 Mich 1211 (1988), the respondent judge opened a checking account denominated the *HELP* fund to assist indigent drug and alcohol abusers who appeared in court. Funds came from a variety of sources. Some of the funds came from contributions by attorneys whom the judge amerced for the late filing of pretrial statements, for tardy appearances, or for failure to appear on court dates. Other receipts and disbursements were unrelated to official duties. The judge was found to have given the appearance of using the powers of his judicial office to solicit monies from attorneys for the *HELP* fund.

In *In re Hotchkiss*, 415 Mich 1101 (1982), the solicitation involved campaign fundraising. The respondent judge telephoned an attorney and personally solicited a campaign contribution from him and his law firm.

There are also several advisory and ethics opinions addressing the impropriety of judges directly soliciting funds. Formal Opinion on Judicial Ethics *J - 1* (1989) clearly states, "A judge may not personally solicit funds for an educational, religious, fraternal or civic/charitable organizations or cause." It further states that speeches, broadcasts, or other communications where the judge asks others to contribute would therefore be improper, whether or not the judge is identified by judicial title. In Formal Opinion *JI – 3*, which states a judge is prohibited from participating in the sale of items where the primary purpose is to solicit funds for charitable or philanthropic organizations, the Committee noted that although it has consistently held that "fund-raising for charitable organizations is not only 'laudable' and should be encouraged to the extent that it is not clearly prohibited by the Code of Judicial Conduct, every reference to person-to-person solicitation of funds rather than a 'general appeal' has been found to be improper." Formal Opinion *JI – 33* (1990) reiterates that a "judge may not personally solicit funds on behalf of any organization" but notes that "an organization of judges may retain a non-judge executive director to solicit funds for the organization's charitable and educational activities." Formal Opinion *JI – 48* prohibits a sentencing judge from giving defendants the option of performing a designated number of community service hours or making a monetary contribution to a charity designated by the judge. The Opinion further states:

> Underlying the prohibition against judicial solicitation is the notion that it is **not ordinarily possible to solicit without raising the suspicion that the judge is using the power and prestige of judicial office to persuade or coerce others to contribute.** No matter how well intentioned, the work of solicitation for charitable purposes is better left to

> persons other than those who occupy the bench. **The rule is not limited to solicitation for charity but applies equally to civil, ecclesiastical and other philanthropic enterprises.** (Emphasis added)

Courts in other jurisdictions have also found personal solicitations by a judge to constitute judicial misconduct. In *In re Arrigan*, 678 A2d 446 (Rhode Island 1996), the Rhode Island Supreme Court held that the judge improperly solicited funds on behalf of certain charitable organizations from attorneys who practiced before him in violation of the Code of Judicial Conduct.

In *In re Gallagher*, 326 Or. 267, 951 P2d 705 (OR 1998), the judge had signed invitations to a golf fundraiser for his campaign, and had his judicial assistant type numerous letters unrelated to his judicial duties on official court stationery. The Court concluded:

> We concluded that the accused's extensive use of his judicial assistant's time, and of state property and equipment, for personal and campaign purposes violated former Canon 2 A. Taxpayers have a right to expect that the employees and the materials for which they pay will be used for public purposes. Obtaining substantial personal and political benefits directly from the use of those public employees and materials runs afoul of the requirement to 'act *** in a manner that promotes public confidence in the integrity *** of the judiciary' For the same reason, the accused's conduct violated JR 1-1-1(A), which contains substantially the same requirement. *Id*. at 283
>
> * * *
>
> **In addition, we find that the use of official letterhead** – and in most instances further references to the accused's office (such as the typing of his title beneath his signature) – in the examples quoted in the Findings of Fact above **would cause an objective observer reasonably to conclude that the accused was lending the prestige of the office to advance his own private interest.** *Id*. (Emphasis added.)

The Court further found that the respondent judge's actions were willful, that he repeatedly used the letterhead and title of his office in correspondence designed to obtain personal advantages,

including financial advantages, and the use of one's judicial office as a pressure tactic to gain personal advantages for oneself or others undermines public confidence in the judiciary and in its integrity and impartiality, and "reflects adversely on the judge's character, competence, temperament or fitness to serve as a judge." *Id*. at 286 - 287. The same can be said of Respondent.

Respondent's fundraising activities were far more widespread than those described in the above cases. He individually and directly contacted several corporations and individuals to solicit contributions to pay for and advance his program. He actively solicited money from Saginaw's largest law firm, the attorneys of whom practice regularly before him. He did all this on court letterhead. He also misrepresented facts to further his agenda. And although his goals were ostensibly benign and even meritorious, there was a definite self-serving and self-promoting aspect. There was personal gain to Respondent. He owns the copyright of a marketable program as a result of contributions he personally solicited. He received $2000 for two speaking engagements about that same program. His name was plastered everywhere on pamphlets, brochures and ads that cannot help but benefit him politically. Further, Respondent's actions did not occur in some gray area of judicial ethical standards. The Code of Judicial Conduct, court rules, case law, and numerous ethics opinions specifically forbid Respondent's conduct.

D. Respondent Persisted In Personally Soliciting Funds After Being Warned Not To Do So By The Regional State Court Administrator

Respondent's misconduct in soliciting funds from numerous individuals and organizations is exacerbated by his willfulness in violating the Code of Judicial Conduct. Not only is it clearly stated in Canon 5 of the Code of Judicial Conduct, but Respondent was specifically warned by the Region III State Court Administrator, Bruce Kilmer, in 1999, not to

solicit funds. (See Volume 2, 283 - 285, 295, 313 -315, 341, *Kilmer*; also, see discussion above, pages 9 – 10.)

Respondent tried to exculpate himself by pointing out he had brought to the attention of John Ferry, Bruce Kilmer and Kevin Bowling the fact that he had received money and deposited it in the Saginaw Community Foundation fund when they met on March 12, 2001. (Vol. 3, 493, *Mr. Thomas; a*lso, see discussion above, pages 8 – 10. What Respondent failed to point out, however, is admitting to *receiving* money is not the same as admitting to *soliciting* money. The Master recognized the distinction:

> Master: As I said, in every reelection campaign there is a Committee that raises funds for a Judge's reelection, without the Judge ever soliciting a penny. **There is certainly a distinction to be made** and is made every day. So the question is whether you can elicit evidence that others were aware that he was soliciting versus whether you can elicit evidence that others are aware that funds were being raised. (Volume 3, 494, *Master*, Emphasis added)

Once Respondent realized he was not going to be able to manipulate the answer he wanted by framing an inappropriate question, he decided not to pursue the issue: "Judge, I'll tell you, it's been kind of watered down and lost a little meaning, I'm ready to move on." (Volume 3, 494, *Mr. Thomas*)

E. Respondent Abused His Judicial Position And Misused Court Resources

A judge is personally responsible for his or her own behavior. MCR 9.205(A). Grounds for action against a judge are established in MCR 9.205(B). Misconduct in office includes, but is not limited to "misuse of judicial office for personal advantage or gain, or for the advantage or gain of another." MCR9.205(B)(1)(e). Appropriation of court services, facilities, equipment and other court materials constitutes judicial misconduct. I*n re Cooley*, 454 Mich 1215 (1997).

In *In re Gallagher*, 326 Or 267; 951 P2d 705 (1998), the judge repeatedly used court letterhead and title of his office in correspondence designed to obtain personal and financial advantages. The Court concluded the judge knew, in using the stationery, that the fact of his position was likely to play a prominent role in the recipient's response to each such letter. *Id*. at 286. It concluded, "Most seriously, the accused systematically used state-paid services, property, and equipment to further his campaign fundraising and his private interests, and he systematically used his position as a judge to try to obtain financial advantages for himself and those close to him." *Id.*

Judge Thompson used the prestige of his judicial office to solicit funds as well as to garner more interest in his program. He used official 70th District Court stationery for his correspondence, both with respect to solicitations as well as certain business correspondence regarding the production of his materials. He used his judicial position in advertisements, such as his presentation of the United States Air Force Strolling Strings ad brochure. (Exhibit 55) Thus he essentially used his position for his own publicity, a form of campaign advertisement.

III

RESPONDENT'S MISREPRESENTATIONS CONCERNING NON-EXISTENT SPONSORSHIP AGREEMENTS CONSTITUTE MISCONDUCT

A. Respondent's Affirmative "Mistake Of Fact" Defense Lacks Merit

Good faith is not an affirmative defense to the *charge* of misconduct, *i.e.* misrepresentation. Misrepresentations made by a judge *do* constitute judicial misconduct. See *In re Ferrara*, 458 Mich 350 (1998), *Matter of Binkowski*, 420 Mich 97 (1984), and *Matter of Lawrence*, *supra,* at 261. Judge Ferrara made false public statements denying she made certain statements that were preserved on audio-tapes. Judge Binkowski altered a letter from the

Commission admonishing him in order to misrepresent to other judges that he had been exonerated. Judge Lawrence wrote two letters in support of an applicant for a gun permit containing material misrepresentations that were influential in the decision to issue a gun permit.

Affirmative defenses assume that even if the claim is true, it should fail because of the circumstances. *Michigan Court Rules Practice*, Rule 2111.12, p, 27, 4th Ed (2002 Pocket Part). An affirmative defense is one that admits the doing of the act charged, but seeks to justify, excuse, or mitigate it . . . 21 *Am Jur* 2d, Criminal Law, § 183, p 338, cited in *People v Lemons*, 454 Mich 234 (1997). It is a defense that does not controvert the plaintiff's establishing a *prima facie* case, but that otherwise denies relief to the plaintiff. *Cole v Ladbroke Racing*, 241 Mich App 1, 9 (2000), citing *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307,312; 503 NW2d 758 (1993), citing *Campbell v St. John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990).

An affirmative defense cannot succeed unless the matters upon which it rests are proved. The burden of producing evidence and establishing these facts rests upon the party asserting the defense, which in this case is the Respondent. *Booth Newspapers*, *supra*, at 109. *Pollack v Oak Office Building*, 7 Mich App 173; 151 NW2d 353 (1967).

The Examiner has already addressed the impropriety of Respondent's attempt during the hearing to suddenly raise an affirmative defense of "intent." (See discussion above, pages 8 – 11.) Additionally, Respondent seeks to defend the allegations concerning his misrepresentations on the basis of the affirmative defense of "mistake of fact." A mistake of fact is "a misunderstanding, misapprehension, error, fault or ignorance of a material fact, a belief that a certain fact exists when in truth and in fact it does not exist." *Sentry Ins v Claims Co*, 239 Mich App 443, 447 (2000), citing *Montgomery Ward & Co v Williams*, 330 Mich 275, 279; 47 NW2d 607 (1951).

Respondent's affirmative defense of "mistake of fact" is, in essence a good faith defense. With respect to such defenses, the Michigan Supreme Court has clearly stated: "There is no doubt that 'good faith' should be considered as a mitigating factor to acts of misconduct but not as an affirmative defense to charges of misconduct." *Matter of Laster*, 404 Mich 449, 461 (1979); *Matter of Lawrence*, 417 Mich 248, 267 (1983). (Also see discussion above on pages 3 - 4.)

Respondent maintains he made the representations concerning co-sponsorship based on a good faith belief that the parties and entities involved had agreed to co-sponsor his program. He does not rely on any written documents or statements by those parties, but on correspondence he sent purportedly confirming various "agreements." Under the circumstances his purported belief an agreement existed can hardly be considered reasonable. As discussed below, (a) none of the entities ever agreed to sponsor or co-sponsor or endorse Respondent's program, (b) Respondent knew they had never agreed to sponsorship, and (c) his alleged reliance on their failure to correct his misstatement about something that had never occurred was unreasonable under the circumstances.

B. The State Court Administrative Office, Michigan Judicial Institute And Michigan Department Of Education Never Agreed To Co-Sponsor Or Co-Endorse Respondent's Programs Or Authorize Him To Make A Public Declaration To That Effect

On March 12, 2001, State Court Administrator John Ferry, Jr. ("John Ferry"), Michigan Judicial Institute Director Kevin Bowling ("Kevin Bowling"), and Bruce Kilmer met with Respondent to hear about his "Making Choices and Facing Consequences" project pursuant to his request. (Volume 1, 81, *Ferry*; Volume 3, 359; *Bowling*; and Volume 5, am, 791, *Thompson*; Answer, paragraph 3, and Exhibit F, page 2) On April 20, 2001, John Ferry, Kevin Bowling and Michigan Department of Education Assistant Superintendent Dr. Donald Weatherspoon ("Dr.

Weatherspoon"), met to further discuss and explore his program. (Volume 3, 377, *Bowling*; Volume 5, am 799, *Thompson*, and Answer, par. 3) Both the March 12 and April 20 meetings were preliminary discussions that did not result in any definite resolutions. (Volume 1, 88, 91 – 92, *Ferry*; Volume 3, 380 – 382, *Bowling*)

At the April 20 meeting it was determined there would be continued discussions to explore ways the program might be used in schools. There were many issues to resolve, and curriculum studies and tests to be carried out before an accurate evaluation of Respondent's program could be made. John Ferry and Dr. Weatherspoon both had several concerns. (Volume 3, 423 – 424, *Bowling*, and Volume 4, 568, *Weatherspoon*) Dr. Weatherspoon testified the purpose of the April 20th meeting was:

> [**t]o see if we could go further** in terms of having – with what the judge's materials were, **see if it was worth pursuing** using a larger framework; and I say, 'a larger framework,' we would not go forward by ourselves, we would have to have something from the Court Administrator's office because there was discussion in that meeting about other courts being involved.
> (Volume 4, 565, *Weatherspoon,* emphasis added)

The parties decided to regroup in July after some of the studies and tests were conducted to determine the viability of the program and possibly to consider issuing a joint letter at that time. (Volume 3, 423 – 425, *Bowling*) Respondent sent a letter on April 24, 2001 to the individuals he had met with. (Exhibit 63) On April 29, 2001, he ignored the group's decision of the April 20 meeting concerning the need for further evaluation and sent another letter to the parties enclosing a copy of his proposed draft joint letter that was not to be considered until July. (Exhibit 64)

John Ferry, Kevin Bowling, Bruce Kilmer and Dr. Weatherspoon each testified that they had never agreed to endorse or sponsor Respondent's "Making Choices and Facing

Consequences" program, or any other program of Respondent's. (Volume 1, 91 – 92, 99, 158, *Ferry*; Volume 2, 286, *Kilmer*; Volume 3, 357, 387 – 388, 421 – 423, *Bowling*; Volume 4, 573 – - 576, 584, *Weatherspoon*) John Ferry voiced concern about the copyright and the time commitment it might require from Respondent that would detract from his judicial duties. (Volume 1, 88, *Ferry*) He recommended Respondent contact the State Bar Ethics Committee as far as the copyright issue. (Volume 1, 89, *Ferry*) John Ferry was also concerned that there was no specific support they could provide since it was "really a crime prevention program and not specifically within the purview of any of the offices, any of the things that we do in our office, like the Judicial Education Program." (Volume 1, 90, *Ferry*) Mr. Ferry repeatedly stated that he never agreed to co-sponsor Respondent's program and, that in fact, it was not something appropriate for them to co-sponsor. (Volume 1, 91 – 92, 99, 158, *Ferry*)

Bruce Kilmer never agreed to sponsor, co-sponsor, or endorse "Making Choices" or any program Respondent was engaged in, nor did he tell Respondent he would sponsor, co-sponsor, or endorse "Making Choices" or any program Respondent was engaged in. (Volume 2, 286, *Kilmer*) Kevin Bowling never agreed to sponsor, co-sponsor, endorse, fund or assist with funding "Making Choices" or any other program Respondent was engaged in. (Volume3, 357 381, 387 – 388, 421 – 423, *Bowling*)

Dr. Weatherspoon explained that there was an "agreement" to move forward and further explore how the program could be implemented and utilized, but that he had *never agreed* to anything specific and further that the Department of Education was not prepared to move forward without the involvement of the State Court Administrator's Office or the Judicial Institute. (Volume 4, 573 – 575, *Weatherspoon*) Dr. Weatherspoon *did not agree* to anything specific with regard to implementing the programs and *did not agree* to any financial support.

(*Id*. at 576) In fact, Dr. Weatherspoon stated his name could *not* be used in connection with any fundraising attempts. (Volume 3, 476, 478 – 479, *Bowling* and Exhibit ff, Separate Record) In essence, all he agreed to do was keep talking.

At the Michigan Association of School Boards meeting on Mackinac Island in August 2001, Dr. Weatherspoon did make some extemporaneous remarks after being singled out by Respondent. He *did not* suggest the Department of Education had committed to any financial sponsorship, *did not* state it had agreed to do anything with Respondent, *or even that Respondent's program was going to materialize*, but did state he was impressed by the program and was supportive of it. (Volume 4, 580 – 582, 606, *Weatherspoon*) Dr. Weatherspoon also testified that as of August 27, 2001, the date of the last letter Respondent sent to him (Exhibit H), the Department of Education had *not* agreed to sponsor Respondent's programs, financially, that the Department *had not* offered to make any type of joint public declaration with regard to the programs and *had not* agreed to do anything on behalf of the programs. (Volume 4, 584, *Weatherspoon*)

C. "Silence" Did Not Constitute Acceptance Of Respondent's Misstatement

In support of his claim of a "good faith" belief that an agreement existed, Respondent argues that none of the "confirming letters" he wrote to the recipients (Ferry, Bowling and Weatherspoon) resulted in the recipients writing to correct or contradict his misunderstanding of the various sponsorship "agreements." (Answer, pages 2-3 and 8) Even Respondent admits there was no enforceable agreement. (Volume 5, pm, 918, *Thompson*) There was certainly no contract in the legal sense, yet he seeks to place this in the context of offer and acceptance. A valid contract requires mutual assent on all essential terms. *Eerdmans v Maki*, 226 Mich App 360, 364 (1997). Even so, the general rule is that silence alone will not constitute a valid

acceptance. *Turner Associates, Inc. v Small Parts, Inc*., 59 F Supp2d 674, 681 (E.D. Michigan 1999), citing *Gorham v Peerless Life,* 368 Mich 335, 340 (1962). Mere silence may not, under ordinary circumstances, be construed as indicating consent. *Wilkinson v Lanterman*, 314 Mich 568, 573 (1946). Further, mere discussions and negotiation cannot be a substitute for the formal requirements of a contract. *Eerdmans*, *supra*, at 364. In the instant situation, mere discussions were all that had taken place.

Nor can silence or inaction form the basis for equitable estoppel where the silent party had no duty or obligation to speak or take action. *Conagra v Farmers State Bank*, 237 Mich App 109, 140-141 (1999). None of the parties in this matter – John Ferry, Kevin Bowling, Bruce Kilmer or Dr. Weatherspoon – had any obligation or duty to speak or take action to respond to Respondent's letters. This was not a contract matter. They knew they were merely discussing potential future application of the program and nothing else. Respondent attempted to set the gentlemen up by including a statement he knew was not accurate among other areas of discussion. He then attempted to bolster the success of his solicitations for money for his program by referring to the non-existent sponsorship agreement. His conduct was dishonest and he should not be permitted to defend on the basis of "mistake of fact." There was no mistake. Everything he did was planned and intentional.

Respondent's actions in even sending the so-called "confirming" letters are unusual. He went out of his way to write the sort of "confirming" letter that one attorney would write another in an adversarial relationship. His authoring of these letters looks like a way to try to trap the recipients into a position they never took.

It is evident Respondent was pursuing his own agenda and intentionally attempting to shift the burden to the recipients by placing them in a position of having to refute his statements.

These were busy men, only tangentially involved with Respondent's plan. They did not feel compelled to respond to something that did not concern them significantly; were unaware Respondent would misrepresent to others that they had agreed to sponsor his program to foster interest in and financial support for his program; and they certainly did not feel the need to refute his artful misstatements in anticipation of being witnesses in a misconduct hearing.

Respondent wrote the first "confirming" letter on April 24, 2001 (Exhibit 63), followed up with a draft letter announcing the "Michigan Supreme Court State Court Administrator's Office [sic], the Michigan Judicial Institute and the Department of Education" had "*joined forces*" to "*launch*" his program. (Exhibit 64) He had no response to his draft, and after basically hearing nothing further from the various individuals concerning the advancement of his project, Respondent wrote another letter on August 27, 2001 (Exhibit G). In that letter, addressed to John D. Ferry and Kevin J. Bowling, he begins:

> As you know, its [sic] been over four months since we met with Dr. Donald B. Weatherspoon, Assistant Superintendent, Michigan Department of Education and agreed to jointly sponsor Making Choices And Facing Consequences [sic] as a pilot program in 10-15 school districts and throughout the State of Michigan. There has been very little forward progress since that time.

Respondent then references a letter he was "simultaneously forwarding to Dr. Weatherspoon concerning this delay" (Exhibit H) and concludes the letter, asking:

> **Will the State Court Administrator's Office and the Michigan Judicial Institute issue a joint press release** formally endorsing the program and announcing its plans to co-sponsor the program? **Please advise**. (Exhibit G, emphasis added)

Thus, as of August 27, 2001, it was eminently clear from Respondent's query in his letter, that he did not know if the two entities were going to endorse or co-sponsor the program.

Even more importantly, Respondent's request, "**please advise**" makes it abundantly clear that silence on the part of the recipients could only be taken to mean they ***were not*** going to issue a joint press release formally endorsing the program and announcing plans to co-sponsor the program. Respondent himself testified he considered the program to be alive, but dying at the end of August. (Volume 5, pm, 931, *Thompson*) He also testified that he did nothing further to spur the program forward with John Ferry, Dr. Weatherspoon, or Kevin Bowling. (*Id*.) None of them responded to his letter and Dr. Weatherspoon did not provide him with the information he had requested. (Volume 4, 583, *Weatherspoon*) Clearly, Respondent could not reasonably have assumed that there was any endorsement, sponsorship or co-sponsorship happening with the parties. Notwithstanding the admitted lack of response from the recipients to the August letters, Respondent continued to write letters proclaiming co-sponsorship by the entities to others. On October 29, 2001, Respondent sent a letters to Justice Weaver (Exhibit hh) and Chief Justice Maura Corrigan (Exhibit ii). On December 7, 2001, he sent letters to Justice Marilyn Kelly (Exhibit jj) and Justice Young (Exhibit kk). Each letter contained the following statement[6]:

> The Michigan Department of Education, the State Court Administrator's Office and the Michigan Judicial Institute have agreed to jointly sponsor Making Choices and Facing Consequences as a pilot program in 10-15 school districts throughout Michigan. We are currently in the process of selecting the school districts, completing our program materials, and working out an implementation schedule.

Significantly, Respondent did not provide copies of the letters he sent to the justices to John Ferry, Kevin Bowling or Dr. Weatherspoon, which would have been a logical thing to do under the circumstances. Additionally, Respondent sent a letter to attorney John A. Decker on January

[6] In the letter to Justice Weaver, Respondent prefaced the paragraph with, "as you know, the Michigan Department of Education…" and included the statement, "This process is going very slow and anything you might do to help facilitate it would be greatly appreciated."

7, 2002 and Helen M. James on January 24, 2002, soliciting financial support. In the third paragraph of each of those letters, knowing no such joint agreement existed, he again stated:

> The Michigan Department of Education, the State Court Administrator's Office and the Michigan Judicial Institute have agreed to jointly sponsor Making Choices and Facing Consequences as a pilot program in 10-15 school districts throughout Michigan. We are currently in the process of selecting the school districts, completing our program materials, and working out an implementation schedule.

Even if at an earlier time Respondent could have reasonably believed there had been an agreement, he certainly could not have thought so after receiving no response to his August 27, 2001 letter, or in October 2001 or December 2001, when he admitted having no more contact with the parties, and *under no circumstances could he have believed so in January 2002!*

The individuals who had met or otherwise had contact with Respondent concerning the possible use and implementation of his program (John Ferry, Bruce Kilmer, Kevin Bowling, and Donald Weatherspoon), as described above, testified at length and convincingly that they had never agreed to co-sponsor or endorse Judge Thompson's Making Choices and Facing Consequences program or any other program by him.

Respondent was impatient. He did not want to wait for the parties whose support he was seeking to consider all issues and fully evaluate his program. He therefore used their preliminary meetings to bootstrap his attempts to garner support from the Supreme Court Justices by representing the meetings as co-sponsorship agreements by the parties, something that never occurred. He used the same tactic to solicit funds to further promote his program. Most significantly he did all this knowing full well that not only was there no agreement, but even if there had once been a burgeoning agreement, it was now dead and buried.

Respondent wanted to make things happen merely by saying so. Respondent apparently proposes that his so-called "confirming" letters to the various individuals with whom he met to discuss a means for implementing his program some how put the meetings in the context of contractual obligations. Respondent claims he sent the letters to make sure there was a "meeting of the minds," "mutuality of assent," and common purpose." (Volume 5, am, 803, *Thompson*) In fact the letters constituted nothing more than Respondent's calculated attempt to place a particular spin on the meetings for his own benefit. He then used his self-created "sponsorship" agreement to seek financial and other support for his program, which also garnered him considerable positive publicity.

He could not wait for the other parties to complete their studies, testing and evaluations to see whether his program could be utilized and how. Even when they agreed to continue discussions, with the goal of possibly committing to some joint effort some three months hence, Respondent could not wait. On April 24, 2001, he followed up the April 20, 2001 meeting with a letter (Exhibit 63), and then five days later followed up with another letter (Exhibit 64), in which he enclosed a copy of his proposed draft joint resolution, something the parties had agreed to discuss in July. (Volume 3, 423 – 425, *Bowling*).

IV

THE MASTER SHOULD GIVE LITTLE WEIGHT TO TESTIMONY BY RESPONDENT AND SOME OF HIS WITNESSES

A. Respondent's Testimony Frequently Lacked Credibility

Finally, in evaluating Respondent's own credibility, the Master must consider all the circumstances. In doing so, one instantly notes many discrepancies in Respondent's testimony, his misrepresentations to others, and the self-serving nature of many of his actions and statements. As discussed elsewhere, there is ample evidence that none of the three entities were

on board with respect to Respondent's program. Not only did Respondent admit it was dying at the end of August, 2001, he acknowledged the three entities he claimed had agreed to co-sponsor the program had provided no support, endorsement or activity, as his answers to the Examiner's questions reveals:

Q. **The pilot program that was going forward in October, that was going forward under the auspices of the State Court Administrative Office, was it?**

A. **No**.

Q. It was not going forward under the auspices of the Michigan Judicial Institute, was it?"

A. I'm not sure what your question is asking me.

Q. I'll rephrase it… Was the pilot program of October 2001, did it receive any support from the State court Administrative Office?

A. No additional support, no.

Q. Other than what had been done up to August 27th?

A. That's correct.

Q. Did it receive an endorsement from the State Court Administrative Office in October?

A. No, it was in abeyance. **There was no activity going on between me and the State Court Administrator or Judicial Institute.** There were activities going on with respect to the program.

Q. Is it fair to say that those activities that were going on are activities that you were conducting on your own?

A. Yes.

Q. **It was not done with anybody else's participation – sponsorship**.

A. **That's correct**.
(Volume 5, pm, 936 – 937, emphasis added)

There are many problems with Respondent's credibility. Respondent's attempts to claim he was mistaken in his understanding that an agreement existed to co-sponsor his program is just one example. All three parties repeatedly testified there had never been an agreement. Respondent's so-called "confirming" letter was simply a deceitful ploy to push forward his agenda and a bad faith attempt to shift responsibility to someone else to refute his misstatement. Respondent would have the Master take his word, with all of its lack of candor, over four individuals whose credibility and integrity remain intact.

Respondent claimed ignorance of the prohibition against a judge personally soliciting money, even while acknowledging he had read the Code of Judicial Conduct. (Volume 5, pm, 893 – 894, *Thompson*). Moreover, he had been specifically warned against soliciting money. In addition, Respondent feigned ignorance over his own letter to Lucy Allen, President and CEO of the Saginaw Foundation. Respondent testified that Delphi Corporation had mailed a check to him at his home in the amount of $7,500, that his best recollection was that it occurred in 1999, and that he "panicked" when he received it. (Volume 5, pm, 897, Thompson)[7] Respondent testified he "panicked" because he knew that a judge "is not supposed to receive or handle money" so he "went to the Saginaw Community Foundation and got their agreement to handle all the money for the project and serve as a fiscal agent." (Volume 5, pm, 900, *Thompson*) Yet, when Respondent was asked about admitted Exhibit 1, his May 21, 1999, letter to Ms. Allen at the Saginaw Community Foundation he claimed not to recognize the letter and did not recall sending the letter, which contained his "formal request" that the Saginaw Community

[7] The Master denied the Examiner's request to have Exhibit 12, the letter confirming the contribution, admitted into evidence. (Volume 5, pm, 899) Respondent did stipulate that Examiner's proposed Exhibit 12 consisted of a letter dated August 2, 1999, to which was appended a check in the amount of $7,500 dated July 22, 1999. (Volume 5, 901-902)

Foundation serve as the "Fiscal Sponsor for our Middle School Crime Prevention Initiative." He admitted that he went to the Saginaw Community Foundation and opened an account in 1999, but refused to acknowledge that he did so in May, claiming the letter did not help him recall the month at all. (Volume 5, pm, 903, *Thompson*)

Respondent even tried to influence one witness's written statement of support, a statement that was attached to the answer to the formal complaint. The Respondent simply has not been candid or forthright with this tribunal. [8]

Also telling in evaluating Respondent's credibility is his claim that he "self-reported" to Bruce Kilmer as soon as he became aware there was a problem, implying this was the noble act of a sincere penitent. (Volume 1, 66, *Mr. Thomas*) Mr. Kilmer was already aware of the solicitations. (Volume 2, 309 - 310, 313 *Kilmer*) Respondent knew all along what he was doing was wrong. He just had extraordinary luck in getting away with it for several years. Respondent's "self-reporting" was no noble act of confession, but rather a necessary act of self-protection.

Respondent's tendency to exaggerate and "puff" was demonstrated frequently. He referred, for example, to Dr. Weatherspoon's "presentation" on Mackinac Island and testified he spoke for ten, maybe fifteen minutes. (Volume 5, pm, 861, *Thompson*) In fact, Dr. Weatherspoon was not a presenter and gave no "presentation." He was singled out by Respondent and made a few "extemporaneous" remarks. (Volume 4, 581, 606, *Weatherspoon*) Even Respondent's sister, who was present, testified Dr. Weatherspoon only spoke for three to five minutes. (Volume 5, am, 759, *McMillon*)

[8] Respondent solicited and obtained a letter of support from James Brisbois, Esq., that he appended to his Answer to the Formal Complaint. Upon receiving Mr. Brisbois' faxed letter, Respondent faxed a copy of the letter back with a cover sheet, noting: "Mr. Brisbois here are my proposed changes to your character letter. Upon review, please contact me to discuss. Phil Thomas." (Exhibits 75 and 76, Attachment to Answer, and Volume 2, 272, *Brisbois*)

With respect to soliciting money for his program and Law Day activities, Respondent testified that the Saginaw Bar Association was "broke and heavy in debt." (Volume 5, pm, 864, *Thompson*) Although it was acknowledged that the Bar Association had suffered some financial setback due to alleged embezzlement by its prior director, both Kenneth Kable, Esq. (Volume 4, 662 - 666, *Kable*) and Ruth Buko, Esq., (Volume 3, 535, *Buko*), Saginaw Bar Association Board members, testified the Association's financial situation was not as dire as Respondent claimed.

The Examiner questioned Respondent regarding certain language in his March 8, 2002 letter to Susan Whaley-Brady, then president of the Saginaw County Bar Association (Exhibit 53). The letter states in part:

> As part of this effort, I requested that the largest law firm in Saginaw County and certain major corporations step up to the plate and help finance the anti-bullying campaign. **Certain courthouse personalities now say that my passion for helping children has gone too far and I am guilty of inappropriately soliciting money.**
>
> While I disagree, I am simultaneously forwarding a letter to Bruce J. Kilmer, State Court Administrator's Office **with all relevant information and asking him to initiate the appropriate investigation. If I am wrong,** the Court Administrator will initiate the appropriate action. (Emphasis added)

Respondent was asked about the statement, "while I disagree" with respect to "inappropriately soliciting money." (Volume 6, 971 – 972) Instead of admitting that is what he meant, which is confirmed by the context of the rest of the paragraph, Respondent coyly claimed, "Yes, I agreed that my passion for helping children had gone too far." (*Id*.) The letter Respondent sent to Bruce Kilmer, with admissions and attachments to Bruce Kilmer, Exhibit 65, attests to the fact that he was referring to the "inappropriate solicitation of money" in his letter to Susan Whaley-Brady when he claimed he disagreed with that statement. Respondent's comment "If I am

wrong" further attests to the fact that he was not acknowledging his wrongdoing at the time. Respondent's unwillingness to candidly answer questions with respect to various solicitations for money and pro bono services he had made and failed to include in the letter to Bruce Kilmer is revealed in the continued questioning by the Examiner. (Volume 6, 974 – 983)

There are a myriad of examples throughout Respondent's testimony that reflect a lack of candor or intentional vagueness reminiscent of Respondent's refusal to fully cooperate with the Commission in its investigation. The above few examples should suffice to call attention to a certain lack of credibility surrounding much of Respondent's testimony.

B. The Testimony of Respondent's Witnesses Has Little Probative Value

The Master will undoubtedly have noted that none of Respondent's own attorney witnesses supported his defense theories. Respondent called attorney David D. Hoffman, president of the Saginaw County Bar Association president from 2000 – 2001. Mr. Hoffman testified there had been some discussion that if they used Respondent's anti-bullying program there could be some money associated with that that would also help Law Day 2002. (Volume 5, am, 741, *Hoffman*) The Master is reminded of the significant testimony Mr. Hoffman regarding his awareness of the impropriety of a judge soliciting funds and the fact that someone other than Respondent was to be the "point man" for the Law Day fundraising effort:

A. **My recollection is that Mr. Brisbois and Judge Thompson were going to do that and because of Judge Thompson's position Mr. Brisbois was going to have to actually collect any money**.

Q. What do you mean by "Judge Thompson's position?"

A. **Because he was a judge**.

Q. What does that mean?

A. **He couldn't go out and solicit money. He couldn't go out and raise money himself**.

Q. How did you know that?

A. **It was pretty obvious he was a sitting District Judge.**

Q. What does a sitting District Judge have to do with him raising money?

A. Just what I answered. I don't know what you're looking for.

Q. How did you know that a sitting District Judge then could not solicit money?

A. Well, Mr. Brisbois was the Chair of Law Day and Judge Thompson was going to help him because of Judge Thompson's program, my understanding was is that they were going to work hand-in-hand, but Mr. Brisbois was going to be the point man on it.

Q. You didn't answer my question. I asked you how did you know it was obvious that Judge Thompson couldn't solicit money?

A. I don't know. I mean, I knew that internally myself. I don't know, I mean, no one came up to me and told me that. I mean, I assumed that's why two of them were working hand-in-hand. It was Judge Thompson's program, Mr. Brisbois was running the Law Day, he would be the point man for it.
(*Id*. at 749 – 750, emphasis added)

Jeffrey Collison, the current Saginaw Bar Association president, also testified for Respondent. Mr. Collison testified he prepared the minutes from the October 3, 2001 Bar Association Board of Directors meeting (Exhibit 43) in the absence of the Board's secretary, Elizabeth Peters. (Volume 6, 995, *Collison*) Mr. Collison had no independent recollection of what transpired at that meeting. (*Id*. at 999) He also testified that it is the practice and he would expect the Law Day Committee to address the Board on any issues or new developments that might crop up. (*Id*. at 1001)

Respondent also called Attorney Christopher Swartz, who never served on the Board of Directors but has served on Law Day Committees. Mr. Swartz recalled being at Law Day committee meetings where discussions arose about Respondent soliciting money for Law Day. (Volume 6, 1006, *Swartz*) Mr. Swartz did not recall anyone raising an issue concerning the propriety of Respondent soliciting money. (*Id*. at 1008 – 1009) More significantly, Mr. Swartz testified he did not know anything abut the Code of Judicial Conduct and in the fall of 2001 he did not know that it was improper for a judge to solicit contributions of money. (*Id*. at 1011)

As the Master is aware, none of the Saginaw Bar Association attorneys had any duty to act as Respondent's ethical barometer. They had no particular obligation to be familiar with the Code of Judicial Conductor or other judicial standards beyond those relating to their own professional activities. Respondent was the only person with a duty to be aware of and observe the strictures of the Code of Judicial Conduct. He simply made a choice to ignore the rules, and now he must face the consequences.

Respondent also introduced testimony from Mr. Henry McQueen, an unemployed former superintendent of the Buena Vista School District currently in litigation against his former employer. (Volume 5, pm, 835, *McQueen*) Mr. McQueen was called to testify concerning Dr. Weatherspoon's remarks at the August 24, 2002 meeting on Mackinac Island. Mr. McQueen testified Respondent's program was never implemented in the Buena Vista School District. He did not remember what Dr. Weatherspoon said at the meeting (*Id*. at 831), or how long he spoke. (*Id*. at 839) Mr. McQueen summarized the alleged substance of Dr. Weatherspoon's comments only after the answer was spoon-fed to him in the form of a leading question (*Id*. at 831 – 833) Even so, he merely stated, "the substance of what he [Dr. Weatherspoon] said was that those three programs did support the Bully-proof Program." (*Id*. at 833)

When Mr. McQueen was questioned about his reference to the "Bullyproof" program, he demonstrated some unfamiliarity with Respondent's programs by stating "Bullyproof" was a portion of the "Making Choices and Facing Consequences" program. (*Id*. at 835, 839) He "believed" and later was "convinced" that it was the anti-bullying program that Respondent presented at the Mackinac Island meeting. (*Id*. at 835) Actually, "Bullyproof" is a separate "stand-alone" program (Volume 5, pm, 856, *Thompson*, and Volume 5, am, 741, *Hoffman*) that Respondent completed after "Making Choices and Facing Consequences." The components of the copyrighted "Making Choices and Facing Consequences" program include three workbooks and accompanying videos:[9] "Just One…" (Exhibit 58A), "Who Stands Up for Us?" (Exhibit 58B), and "Making Choices and Facing Consequences." (Exhibit 58C) Respondent himself testified that in April 2001, when he claimed the alleged agreement had been reached, that "Bully-proof didn't exist." (Volume 5, pm, 936, *Thompson*) Mr. McQueen's testimony warrants little or no weight by the Master. He testified vaguely that Dr. Weatherspoon made some sort of comment regarding support (not "sponsorship") that was entered into by the three entities for a program that did not exist at the time of the alleged agreement!

Even more questionable was the testimony provided by Dr. Gwendolyn Thompson McMillon, whose identity as Respondent's sister was revealed only after she stated her full name. She was a co-presenter at the August 24, 2001 Mackinac meeting. (Volume 5, am, 754, *McMillon*) She testified that Respondent made reference to the fact that the Michigan Department of Education, the State Court Administrator's Office, and the Michigan Judicial Institute, had agreed to co-sponsor his program. (Volume 5, am, 757, *McMillon*) She also testified that Respondent introduced Dr. Weatherspoon, "who came up and verified that the co-

[9] The "Making Choices and Facing Consequences" program was to incorporate five components, but the other two components were not completed.

sponsorship was going to happen." (*Id*.) She noted that Dr. Weatherspoon spoke "three to five minutes" and it was not a long discussion. (*Id*. at 759) Not surprisingly, Dr. McMillon provided testimony to support her brother's claim that Dr. Weatherspoon said the Michigan Department of Education, the State Court Administrative Office and the Michigan Judicial Institute were "co-sponsoring the program."[10] (Id. at 761 – 762)

Dr. McMillon was clearly programmed to focus on the one fact her brother wanted her to establish: the alleged representation by Dr. Weatherspoon of a "co-sponsorship" by the three entities. That alleged statement was just about the only thing Dr. McMillon could remember "exactly" and even then she was not exactly "exact!" When asked by the Examiner for Dr. Weatherspoon's "exact" words, she first contradicted herself, and then later claimed not to understand she had been asked for his exact words:

> Q. What **exactly** did he say? What were his **exact** words?
>
> A. Well, he talked about the co-sponsorship between the three entities.
>
> Q. I don't want you to summarize what he said, **I want you to tell me exactly what he said**?
>
> A. He talked about the co-sponsorship between the three entities and he also talked about the importance of the School Board members participating in the pilot program, what a wonderful program it was, and those types of things.
>
> Q. And is it your testimony today that you don't remember what his **exact words** were?"
>
> A. I remember the exact words because the co-sponsorship – because we had been waiting for that. So I was very excited when he said it.
>
> Q. **So it's your testimony today that he said the word co-sponsorship**?

[10] The Examiner appropriately objected to the hearsay question and Respondent's attempt to collaterally impeach Dr. Weatherspoon with his sister's testimony, but the Master permitted the answer. (Volume 5, am, 759 – 761)

A. **Yes**.

Q. But you don't remember any of the other **exact** words?

A. Well, he talked about the pilot program.

Q. Do you remember any of the other **exact** words?

A. I remember some of the exact words.

Q. **I want to hear every exact word** that you can remember?

A. Well, he said that the Michigan Department of Education, the Court Administrator's [sic] and the Michigan Judicial Institute had agreed to co-sponsor the program, and that they were going to have a pilot in 10 – 15 school districts. And he also said that he was excited about the program and that it was an exceptional program, and it had the possibility of becoming a national model.
(*Id*. at 764 – 766, emphasis added)

After testifying that she did not recall how many times the word "co-sponsor" was used, Respondent's sister testified she did not hear the word "endorse" and did not recall if Dr. Weatherspoon said "support," "approve" or "agreed to." All she remembered was "co-sponsor." (*Id*. at 766) When the Examiner then tried to determine whether the exact wording she recalled was "co-sponsorship" as she had previously stated, or "co-sponsor" as she was currently stating, Dr. McMillon fatuously stated, "Now a minute ago when you asked me ***you didn't ask for specific words***, this time you did." (*Id*. at 767, emphasis added)

Besides the likelihood of bias from a sibling who is also an educator and was actually involved with Respondent's project, the Master will no doubt recognize how devoid of logic and consistency Dr. McMillon's testimony was. For example, she stated that she remembered the exact words because "we had been waiting for that" and added, "So I was very excited when he said it." Dr. McMillon had already stated that Respondent (her brother) had announced the

alleged co-sponsorship agreement by the three entities, so Dr. Weatherspoon's alleged announcement should not have had any special significance if Respondent had spoken the truth or what he believed to be true. Also, if Respondent had been laboring under a belief since April 20, 2001 that such an agreement was already in existence, there is no reason he and his sister (Dr. McMillon) would have been "waiting" for "that," nor would she have been so "excited." Further, there is no doubt that Dr. Weatherspoon never used the word "co-sponsor" or "co-sponsorship" because he made it very clear that he connoted sponsorship with financial support and there was definitely no financial support forthcoming from the Department of Education. (Volume 4, 572 - 573, 596, 607, *Weatherspoon*) The Master should accord little or no weight to the testimony by Respondent's sister.

V

RESPONDENT FAILED TO FULLY COOPERATE WITH THE COMMISSION INVESTIGATION

Grounds for action against a judge are established in MCR 9.205(B). Misconduct in office includes, but is not limited to, "failure to cooperate with a reasonable request made by the commission in its investigation of a judge." MCR 9.205(B)(1)(f). A judge is personally responsible for his or her own behavior. MCR 9.205(A). Additionally, Michigan Court Rule 9.208 (B) provides: "A judge, clerk, court employee, member of the bar, or other officer of a court must comply with a reasonable request made by the commission in its investigation."

On February 3, 2003, the Commission sent a letter to Respondent, by one of its staff attorneys, requesting, in part, that he provide copies of his "making Choices and Facing Consequences" program/materials and his "Bullyproof" program/materials. (Exhibit 72) On February 20, 2003, Respondent sent a letter to the Commission's Executive Director acknowledging receipt of the February 3 letter and confirming a telephone conversation of

February 5, 2003, during which he advised the Executive Director he would not be providing any additional information or documents until he received copies of the grievances. Respondent also objected to the request on the basis that it was not relevant to the allegations. (Exhibit 73) On March 20, 2003 Respondent was sent a subpoena requesting he provide the same materials by March 31, 2003. (Exhibit 74) Respondent failed to reply to the subpoena until he retained counsel several months later. In the interim the Commission obtained the materials from other sources.

The Commission's request to review the materials for which Respondent had engaged in repeated misconduct by personally soliciting contributions and abusing the prestige of his judicial office was certainly reasonable. Respondent's refusal to comply was not. His actions constitute misconduct in office and conduct clearly prejudicial to the administration of justice.

VI

THERE IS NO MERIT TO RESPONDENT'S CLAIM THAT THE ALLEGATIONS AGAINST HIM ARE THE PRODUCT OF A CONSPIRACY

Respondent's other attempt to deflect attention from his misconduct was to insinuate that somehow the allegations were rooted in a conspiracy of attorneys and judges headed by Saginaw County 10th Circuit Court Chief Judge Leopold Borrello rather than Respondent's own conduct. That tactic must be seen to have failed abysmally. Respondent tried unsuccessfully to elicit testimony that certain witnesses had spoken to Judge Borrello and were therefore biased. (See, for example, Volume 4, 684 – 686, *Kable*, and Volume 3, 555, *Buko*)

The so-called "conspiracy" defense is often proffered by judges facing charges of judicial misconduct. In *Gonzales v Commission on Judicial Performance*, 188 Cal Rptr 880; 657 P2d 372, 379 (1983), the California Supreme Court dismissed the judge's conspiracy defense out of hand, stating: "In a tone that rapidly grows tiresome, he reiterates a conspiracy theory typically

raised as a defense in judicial misconduct investigations." *Id.* The Court found that the judge "utterly failed to grasp either the substance or seriousness of the charges leveled against him by the Commission." *Id*. at 382. The Court found his conspiracy theory without merit.

In *McCartney v Commission on Judicial Qualifications*, 116 Cal. Rptr 260, 526 P2d 268, 286 (1974), the judge argued for an outright dismissal of charges, or at worst censure, and asked the court to excuse his misconduct as "an understandable reaction to an improper campaign by public defenders to entirely preclude him from presiding over criminal trials." The Court found his "defense to be a slim reed at best," noting that the argument was simply no answer to his serious departures from a proper judicial role.

In *Matter of Duckman*, 1988 WL 373392 (N.Y.), the Court rejected Judge Duckman's complaint about the origin of the commission investigation, which was allegedly triggered by a "firestorm of public criticism," rather than a complaint by a lawyer or party and found that "the bar and public are better served when an established course of misconduct is appropriately redressed." *Id*. At 9.

In *In re Peck*, 867 P2d 859 (Arizona 1994), the Court noted its dismay at "the tone and substance" of the judge's "wild, unsubstantiated claims of conspiracy and revenge." The judge accused commission members of academic snobbery and hypocrisy and claimed corruption, collusion, and furthering its own agenda. The Court concluded the "charges have neither credibility nor factual support and will not be addressed," adding that the judge's "accusations only confirm that he lacks the judgment needed to carry out his duties competently. *Id*. At 860. Respondent's conspiracy theory is baseless.

VII

CONCLUSION

The Examiner has met the burden of proving the acts of misconduct alleged in Formal Complaint No. 72. Respondent's long-standing pattern of misconduct consisted of numerous willful, direct and improper solicitations to obtain funding for various educational projects he had engaged in, abuse of the prestige of his judicial office to personally solicit contributions (not for a charity but for his own program), misrepresenting sponsorship to bolster his solicitations and interest in his project, and failing to cooperate with certain commission requests during its investigation. Among the many factors tending to exacerbate Respondent's conduct are the fact that it occurred in his official capacity as a judge, exploited his judicial position to satisfy personal desires, was intentional and motivated at least in part by selfish motives, involved actual impropriety and the appearance of impropriety, and involved a pattern that took place over a significant period.

Respondent failed to observe the high standards of conduct required by his judicial position, failed to conduct himself in a manner promoting public confidence in the judiciary, abused the prestige of his judicial office, participated in civic and charitable activities that detracted from the dignity of office or interfered with the performance of judicial duties, and misused court resources. Respondent's conduct violates Canons 1, 2, 3 and 5 of the Code of Judicial Conduct and ultimately constitutes conduct clearly prejudicial to the administration of justice and misconduct in office.

The Examiner respectfully submits that the facts set forth in this memorandum and the accompanying Proposed Findings of Fact and Conclusions of Law establish by a preponderance of the evidence that the Respondent, Judge M.T. Thompson, committed misconduct in office and

conduct clearly prejudicial to the administration of justice within the purview of Article VI, Section 30 of the Michigan Constitution of 1963, as amended, and MCR 9.205(B) and that the Master should so find.

JUDICIAL TENURE COMMISSION
STATE OF MICHIGAN

By:_____
Paul J. Fischer (P35454)
Examiner

_____
Anna Marie Noeske (P34091)
Associate Examiner

Dated: January 26, 2004

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